IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 16 OF 1998.

1. Shri Uttam Krishna Caskar.
2. Smt. Shakuntala Uttam Caskar.
3. Shri Datta Krishna Caskar.
4. Smt. Tulshi Datta Caskar.
5. Shri Ramnath Krishna Caskar.
6. Smt. Vinanti Ramnath Caskar.
7. Shri Chandrakant Krishna Caskar.
8. Smt. Prema Chandrakant Caskar.
9. Smt.Ayodhya Krishna Caskar,
   all major of age, residing
   at Dhada Malauli, Sattari,
   Goa. ... Appellants.
   (Orig.Plaintiffs)

VERSUS

1. Shri Shankar Sajro Caskar.
2. Smt. Shankar Caskar.
3. Shri Babuso Sajro Caskar,
   all major of age, residing
   at Dhada, Malaulim, Sattari,
   Goa.
4. Shri Vasant Jairam Gaonkar.
5. Smt. Vasant Gaonkar, both
   major of age, residents of
   Ganje, Usgao, Ponda, Goa. ... Respondents/Orig.
   Defendants.
6. Shri Barkelo Vatko Naik Caskar,.
7. Shri Tano Vatko Naik Caskar.
8. Shri Vinayak Vatko Naik Caskar.
9. Shri Narayan Vatko Naik Caskar.
10. Smt. Anusuya Barkelo Naik Caskar.
11. Smt. Savitri Tano Naik Caskar.
12. Smt. Namu Vinayak Naik Caskar.
13. Smt. Kanchan Vinayak Naik Caskar,
    all of major age,
    residing at Dhada, Malauli, Sattari
    Goa. ... Respondents/
    Orig. Plaintiffs.

Shri J.P. Mulgaonkar, Advocate for the Appellants.

Shri S.N. Joshi, Advocate for the Respondents No.1,2 and 3.

CORAM: N.A. BRITTO, J.

DATE OF RESERVING THE JUDGMENT: 13.04.2004
DATE OF PRONOUNCING THE JUDGMENT: 19.04.2004

J U D G M E N T:

This appeal is directed against the judgment/decree dated 17.7.97 of the learned Civil Judge, Senior Division, Bicholim by which S.C.S. No.85/92 filed by the appellants/plaintiffs against the respondents/defendants has been dismissed.

2. The case of the plaintiffs was that plaintiffs No.1, 3, 5 and 7 were the sons and legal heirs and plaintiffs No.2, 4, 6 and 8 were the daughters-in-law of the late Krishna Tatu Caskar and plaintiff No.9 was the widow of the said Krishna T. Caskar while plaintiffs No.10, 11, 12 and 13 were the sons and legal representatives of Shri Vatko T. Caskar and plaintiffs No.14, 15, 16 and 17 were the daughters-in-law of the said VAtko T. Caskar.

3. The case of the plaintiffs was that there was a property known as "Cumyache Mol" also known as "Ghatiche Advan" or "Cumabia Mol" partly surveyed under No.22/1 of village Malpan of Sattari Taluka which property was bounded on the east by a chain of rocks at the tree of "Gol" (since dead) called Gollicodil Tolopo; to the west by the limits of paddy field or lake known as "Cumbia Shetachi Tol"; to the south by paddy field "Cumbiaxetta" over which there

are black rocks and on the north by the rock which is adjoining to the 'vaingana' of Bimbal Xet.

4. It was further the case of the plaintiffs that a part of the said property "Cumbiachem Mol" was surveyed under the said survey No.22/1 and that the plaintiffs have 2/3 share in the said property, the remaining 1/3 being owned by the defendants in equal shares.

5. The plaintiffs had further stated that the father of the plaintiffs No.1,3, 5 and 7 had purchased 1/3 share of the said property from the heirs of Khemlo Appa Caskar and his wife Rucmini by deed dated 27.4.73 and the remaining 1/3 share was inherited by plaintiffs No.10 to 17 from their ancestor the said Tanu Vatko Caskar.

6. The plaintiffs submitted that due to a mistake and misrepresentation of facts the names of the plaintiffs recorded in the occupants column of the survey was ordered to be deleted by the Awal Karkun by order dated 23.3.1978 in D.C. No.20 and that the plaintiffs had preferred an appeal to the Deputy Collector challenging the said order, but its result was not known and therefore the father of the plaintiffs No.1 to 8 had made a representation to the

Collector, but the Collector did not reply to it nor the appeal was taken on record and thereafter the plaintiffs were informed by the office of the Collector that the said appeal was missing but refused to give anything in writing.

7. The plaintiffs stated that taking advantage of the said situation, the defendants were trying to dispossess the plaintiffs of the suit property and by misrepresenting to the authorities that the defendants alone were the owners of the suit property. The plaintiffs further stated that in consequence of the said wrong entry, the defendants tried to cut the trees from the suit property at least twice but due to timely intervention of the plaintiffs the attempts of the defendants were rendered fruitless but the plaintiffs somewhere in the month of June, noticed that some of the trees in the suit property were cut by the defendants by engaging one Balchandra Marathe and the plaintiffs have made inquiries in the Department of Forest, the plaintiffs came to know that the defendants had obtained a licence from the Deputy Conservator of Forests, North Goa Division, Ponda to fell the trees from the property surveyed under No.22/1 at Malpan and the same was issued on 15.5.1992 to cut three trees and the plaintiffs immediately rushed to the

Forest Department and made a complaint regarding illegal cutting of five trees from the said property and the Forest Officer having satisfied himself, suspended the licence and prohibited the transport of the trees which were cut from the said property. The plaintiffs stated that the cutting of the said trees amounted to invasion of the proprietary and possessory rights of the plaintiffs. The plaintiffs stated that there was another dispute pending before the appellate court against one Shri Narayan Ramkrishna Joshi (R.C.S. No.28/90) (New) which was decided in favour of the plaintiffs. The plaintiffs stated that the said Joshi had encroached upon the land on the eastern side of the suit property and now the defendants with the help of and in collusion with the said Joshi are trying to dispossess the plaintiffs from the suit property.

8. The plaintiffs stated that the defendants are misusing the wrong entries in the Record of Rights and are trying to extract advantage out of the same. The plaintiffs therefore filed a suit praying for a permanent injunction to restrain the defendants from cutting, transferring or in any way damaging or changing the nature of the suit property and also for a declaration that the plaintiffs have 2/3 share in the suit property as owners of the same.

9. The suit was not contested by the defendants and had proceeded ex-parte, and, the plaintiffs led the evidence of plaintiff No.1(P.W.1) who produced several documents and also examined one Ragunath Melekar (P.W.2) to say that both the parties to the suit were distant relations (daigis) and had right to the property. However, the learned trial court after placing much emphasis on the fact that the name of Krishna P. Caskar, father of P.W.1 Uttam was deleted from Form No.III and the plaintiffs had not challenged the order, proceeded to dismiss the suit.

10. At the time of hearing of this appeal, it has been submitted by learned Advocate Shri Mulgaonkar that the plaintiffs were entitled to prove their right to the suit property irrespective of whether their names were on the survey records or not.

11. Learned Advocate Shri Mulgaonkar has further submitted that there was no reason why the learned Trial Judge ought not to have accepted the ex-parte evidence led by the plaintiffs which was supported by documents and which had gone unchallenged. Learned Advocate Shri Mulgaonkar has further submitted that even if the plaintiffs had not challenged the said order of the Awal Karkun dated 23.3.1978 nothing prevented the plaintiffs from establishing their

rights independently of the same in Civil Suit.

12. On the other hand Shri Joshi learned Advocate for the defendants has submitted that the plaintiffs never challenged the said order of the A.K. and in case they had challenged the same, the defendants would not have been able to obtain a copy of Form I and XIV and the said survey No.22/1 which now stands in the name of other persons whose names were not deleted from the said Form No.III. Shri Joshi has submitted that the defendants are in possession of the said Form I and XIV. Shri Joshi has also submitted that the Sale Deed dated 27.4.73 does not refer to the old cadastral survey number and the same was executed soon after obtaining a copy of the certificate of inscription and description and therefore the said sale deed also reflects the boundaries mentioned on the said certificate of inscription and description.

13. In my opinion, the learned Trial Court has committed a serious error in not accepting the ex parte evidence led on behalf of the plaintiffs and by not examining the documents produced by the plaintiffs before dismissing the suit filed by the plaintiffs. The plaintiffs were certainly entitled to establish their right to the suit property

irrespective of whether their names were entered in the survey records or whether after their names were entered, the said names were deleted or not. It does appear that the plaintiffs did not challenge the said order of the A.K. dated 23.3.1978 in D.C. No.20, for in that event the survey in respect of survey No.22/1 would not have been promulgated, but that did not prevent the plaintiffs to file a separate suit to establish their rights to the suit property. The plaintiffs had produced the certificate of inscription and description of the suit property which showed that the property was inscribed amongst others in the name of Khemlo Appa Caskar from whose son the father of P.W.1 Uttam had purchased 1/3 share of the suit property by deed dated 27.4.73 (Exh.P.W.1/D). The said certificate also shows that the suit property was inscribed in the name of Tano V. Naik Caskar and it was pleaded by the plaintiffs that plaintiffs No.10, 11 12 and 13 were his sons and legal representatives. The plaintiffs had produced a plan of cadastral survey No.42 (Exh.P.W.1/C) which shows that the property was registered in the names of Tano A. CAskar among others. The plaintiffs had also produced plan of new survey No.22/1 which to a great extent corresponds to cadastral survey No.42 and there was no dispute that initially the names of the father of P.W.1 and the said Tano V. Caskar were

recorded in Form No.III (Exh.P.W.1/A) and there was nothing on record to know as to why the said names were deleted by the said Awal Karkun. The plaintiffs through the evidence of the said Uttam (P.W.1) and Ragunath (P.W.2) had proved, and without any contest from the defendants, that they had right to the suit property part of which was surveyed Under No.22/1 and there was absolutely no reason why the learned trial Court ought not to have accepted the evidence of the said two witnesses which was supported by the documents referred to and decreed the suit as prayed for by the plaintiffs. It is not known why the defendants did not contest the said suit. In my opinion the learned trial Court erred in not accepting the ex-parte evidence led on behalf of the plaintiffs and not considering the documents produced by them and in dismissing the suit. The learned trial Court ought to have decreed the suit on the basis of the ex-parte evidence led on behalf of the plaintiffs. It had to be noted that the plaintiffs had not claimed any exclusive right to the suit property but had acknowledged the rights of the defendants as well to the suit property and consequently the learned Trial Court ought to have restrained the defendants from cutting the trees from the suit property and from damaging the same without the consent of the plaintiffs who were the co-owners

of the said suit property.

14. In view of the above, the appeal deserves to succeed and the judgment and decree dated 17.7.97 deserves to be set aside. Consequently the suit of the plaintiffs shall stand decreed in terms of prayers (a) and (b) of the plaint. Considering the facts the parties shall bear their own costs.

N.A. BRITTO, J.

sl.